SUPREME COURT OF THE UNITED STATES.

No. ~~191~~. 112. 33. 34. 35. 3429.

JAMES S. MONTGOMERY, PLAINTIFF IN ERROR,

vs.

MARTIN R. P MATHIS, SHERIFF.

IN ERROR TO SUPREME COURT OF STATE OF ARKANSAS.

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INDEX.

	Original.	Print.
Proceedings in circuit court	1	1
Bill	2	1
Order for injunction	11	6
Injunction bond	12	6
Agreement of counsel	13	7
Decree	14	7
Proceedings in supreme court—agreement of counsel	15	8
Assignment of errors	16	9
Joinder	17	9
Final decree	17	9
Appeal bond	18	10
Clerk's certificate	19	11
Writ of error	20	11
Citation and service	22	12

Gideon, print.

STATE OF ARKANSAS,
In the Supreme Court.

Be it remembered, that at a supreme court of the State of Arkansas, begun and held at the court-house, in the city of Little Rock, on the first Monday, being the 2d day of January, A. D. 1860, amongst others, were the following proceedings before the Hon. Elbert H. English, chief justice, and the Hon. Freeman W. Compton, judge of said court, in the case of—

JAMES S. MONTGOMERY, Appellant,
vs.
MARTIN R. P. MATHIS, as Sheriff, &c., Appellee.
} No. 280.—Appeal from Chicot Circuit Court, in Chancery.

Be it remembered, that heretofore, to wit, on the 31st day of December, eighteen hundred and fifty-eight, appellant filed in the office of the clerk of said supreme court the transcript of the record of said circuit court in this cause, which is in the following words, to wit:

Pleas before the Honorable John C. Murray, judge of the 2d judicial circuit of the State of Arkansas, at a court begun and held at the court-house in the town of Lake Village, in Chicot county, Arkansas, on the first Monday after the fourth Monday in September, A. D. 1858; and on the 4th day of the term, and on the 7th day of October, A. D. 1858, among others, the following proceedings were had, to wit:

JAMES S. MONTGOMERY, Complainant,
vs.
MARTIN R. P. MATHIS, Defendant.

Be it remembered, that heretofore, to wit, on the 29th day of March, A. D. 1858, the complainant, by his solicitors, filed in the office of the clerk of said court, in the above cause, his "bill for an injunction," which is in the words and figures following, to wit:

Bill.

The State of Arkansas, in the Chicot Circuit Court, to the March Term, 1858.

To the Honorable Theodoric F. Sorrels, Judge of the Circuit Court, in Chancery sitting:

Complaining, showeth unto your honor, your orator, James S. Montgomery, of the county of Chicot and State of Arkansas, that he is the owner of the following lands, lying and being in the county and State aforesaid, to wit: The N. W. fr. ¼ of section 18,

township 14 S., range 3 west, and the southwest ¼ of section 18, and the south ½ of N. E. ¼ sec. 18; S. W. ¼ of sec. 18, and the west ½ of W. ½ of N. E. ¼ of section 18, and S. E. ¼ section 18, and west ½ S. W. ¼ section 17, and west fractional ½ of section 19; all of the above described lands being in township 14 south, of range 3 west.

And your orator showeth, that by an act or pretended act of the general assembly of this State, entitled "An act to provide for making or repairing levees in Chicot county," approved 7th January, 1857, and an act supplementary to an act passed at the present session of the general assembly, entitled An act to provide for making and repairing levees in Chicot county, approved 7th January, 1857, it is enacted and declared that there shall be levied and collected, in the county of Chicot, an annual levee tax on all alluvial lands in said county that would be benefited by levees, and which are or should be taxable for State and county purposes for each year, commencing with the year A. D. 1857, of not less than one-fourth of one per centum, nor more than one per centum upon the assessed value of said lands, provided that no lands which shall be so taxed for levee purposes to raise said tax shall he valued at less than ten dollars per acre, and each of the levee inspectors provided for by said first mentioned act shall assess all the lands in his district which are or shall be taxable under this act, and shall make and certify, under oath, to the clerk of said county, his assessment list, and the clerk shall ascertain and state upon the tax book the amount of levee tax chargeable upon each tract of land, according to the valuation of said land assessed in the manner aforesaid, and in accordance of the order of the county court, fixing the rate of the levee tax, and the sheriff shall collect said tax and account for the money in accordance with law, and each levee inspector shall be the sole judge of what lands would be benefited by levee work, and shall embrace in his assessment list only such lands as he shall deem of that description; that the first section of said first act provided, that at each general election thereafter, there shall be elected a levee inspector for each levee district in said county, and that no person shall be a voter in the election of said levee inspector who does not reside on or cultivate alluvial lands in the county, subject to be assessed and taxed under the provisions of said act, but that the county court of said county should, at the first term holden after the passage of said act, appoint or elect, for the county of Chicot, five levee inspectors, who shall be qualified according to the provisions of said act, and who should constitute the board of inspectors for said county, and who should hold their office until their successors should be duly elected and qualified; and the persons so appointed shall have power to make such rules and regulations as they may from time to time deem necessary.

By section 14 of said act it was made the duty of said board of levee inspectors to appoint a treasurer, who shall hold his office during the pleasure of the board, to whom the sheriff, whenever called upon by him, should pay over all the money collected by said act.

By virtue of the 15 section, it was made the duty of the inspectors to lay off the county into levee districts, of suitable and convenient size for an inspector to perform the duties of, and that in all future elections there are to be elected an inspector for each of said districts, and every inspector is required to reside in the district for which he is elected, and be a freeholder, and that thereafter the board should consist of the whole number so elected.

By section 7 of said act it was declared to be the duty of said inspectors, at their meeting on the first Monday in May in each year, to order the levees at the most important points in each of said districts to be repaired or built.

By section 8 the levee inspectors, together with two freeholders of his district, was to lay off the levees therein directed by the board to be built, and that by section 9 he was to let out the building or repairing of levees in his district.

Section 15 of said act declares that the assessment and levy of said tax shall be made by the county court, by an order of said county court, designating the amount per acre, and the item of payment of said tax, which order shall be published in some newspaper for the space of four weeks, in the State, and a copy thereof be put up in some public place in each township in the county, and it shall not be necessary in any such order of assessment and levy to designate the said lands, either by number or other description; but upon the making and publication of sueh order, that all lands in said county, subject to said tax, are assessed at the rate and payable at the time specified, the same shall be considered as duly and legally assessed; and said tax, duly levied thereon, and such order being duly recorded by the clerk of the circuit court, it shall be his duty to attach a copy of the State and county revenue, which he shall make out annually, and extend the said tax against all lands subject thereto, contained in such list, in a separate column, to be provided for this purpose; and said board of levee inspectors shall have power, and it is hereby made their duty, at their annual meeting in May, to adjust the assessment and levy of said tax by hearing and deciding all questions relating to the improper assessment and taxation of any lands, or the omission to assess and tax, and legally taxable under the provisions of this act, and make additions to, or deductions from, the taxes, as charged in such list upon any lands or against any person whatsoever, and such corrections and deductions may be made upon the affidavit of the person applying therefor, stating the ground upon which it is claimed, or other infor-

mation or evidence satisfactory to the board of inspectors, whose decision shall be final.

Section 16 makes it the duty of the sheriff to collect said levee tax, and in the case of a failure of the owner of the land so assessed to pay the tax due upon it, or within time prescribed by the act, or which might be prescribed by the board, it was made the duty of the sheriff, or collector of, to expose the lands to sale on the first day of the next circuit court, and that if no person shall offer and bid the amount of taxes due on any lot, section, or other subdivision of land, the same shall be struck off to, and purchased by, the treasurer of the board of inspectors, who shall receive a deed from the sheriff thereto as treasurer, and to his successors in office, for the use and benefit of said levee fund.

And your orator would further show, that in accordance with the provisions of said act, or pretended act, but not at the next term after the passage thereof as required by said act, but at a special adjourned term begun and holden on the 24th day of February, 1857, the said county court of Chicot county proceeded to elect and appoint Charles W. Campbell, Daniel H. Sessions, Joshua M. Craig, Nathan Ross and Romulus Payne, whom your prays may be made defendants to this bill (should it be deemed necessary.) Such levee inspectors, and the said Campbell, Sessions, Craig, Ross and Payne, afterwards organized as a board, and elected the said Charles W. Campbell as president of said board, and as such board proceeded to divide the county into levee districts as provided in said act, and to assess said levee tax, and on the 3d Monday of April, A. D. 1857, (which was in fact the first regular term of said court after the passage of said act,) the said board filed in said court a list of lands which they had assesed for such levee tax, to which was affixed a valuation of said lands. And thereupon it was ordered by the said county court, that a tax of five eighths of one per centum be levied and collected on the assessed value per acre of all the alluvial lands in said county, or that are or will be benefited by levees, and which are or shall be taxable for State revenue, according to the value of said lands as fixed by the assessment of said board of levee inspectors, and the collector of the county was authorized and required to make collection of said levee tax on or before the first day of December, 1857, and by said assessment so made by said board, and returned to the county court, all improved lands on the Mississippi river, and contiguous thereto, were valued at thirty dollars an acre, and all unimproved lands throughout the county at ten dollars per acre.

Further complaining, your orator showeth unto your honor, that the above described lands of your orator are included in said assessment; but your orator avers that they are wrongfully assessed, for if they are in any proper and legal sense alluvial lands, they are not benefited by levees within the meaning and intention of said

act. Your orator submits that the benefit to lands contemplated by the legislature, and intended by the act, is an immediate and direct benefit by protection from overflow, by means of the levees, and not an indirect or incidental benefit; that levees are constructed to protect lands from overflow, and that protection is the benefit the legislature intended they should confer to subject the lands to said tax. But your orator avers that the said lands are not, and have not been since the settlement of the county, and perhaps for centuries before, subject to overflow, and are not protected from high water or overflow by any levee, and need none for their protection. It may be true, and your orator does not deny the fact, that since the construction of the levees on the Mississippi, the accessibility from that river to them has been improved, but that that circumstance has not improved their fertility, made them dryer, or in any way more productive, is evident and clear. If the owner, by reason of the levees, has a better road to his lands, that is a benefit to himself and not to the lands.

It is true that by the 15th section of said act, it was made the *the* duty of said board of levee inspectors, at their meeting in May, to adjust the assessment and levy of said tax, by hearing and deciding all questions relating to the improper assessment and taxation of any land, and that a correction of an improper assessment was required to be made upon the affidavit of the [something omitted] on said day sell the same; and your orator has reason to believe, in consequence of the great doubt respecting the legality of such sale, at a great sacrifice, unless restrained by your honor, thereby putting him to great expense, and, in all likelihood, involving him in litigation and lawsuits concerning the same.

Inasmuch, therefore, as your orator is remediless by the rules of the common law, and can only have adequate relief in the premises in a court of equity, may it please your honor to grant unto your orator, not only the State's most gracious writ of injunction, issuing out of said , under the seal of this honorable court, to be directed to the said Martin R. P. Mathis, to restrain him and his deputies from selling or offering to sell the said described lands of your orator, or any part thereof, to pay or satisfy said levee tax, but also the State's most gracious writ of subpœna commanding the said Martin R. P. Mathis to be and appear before your honor, &c., in this honorable court, &c., then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein, as your honor shall seem meet; and your orator shall ever pray, &c.

HARRISON & HOOKER,
Sol's for Compl't.

THE STATE OF ARKANSAS,
County of Chicot.

I, James S. Montgomery, do solemnly swear, that the allegations and facts set forth in the foregoing bill, so far as stated on his own knowledge, is true, and that so far as stated on the knowledge , he believes to be true, so help him God.

JAMES S. MONTGOMERY.

Sworn to and subscribed before me, March 24, '58.

THEODORIC F. SORRELLS, *Judge.*

Order for Injunction.

Having examined the within bill of complaint, and being satisfied that the complainant is entitled to the relief prayed for, the clerk of the circuit court of Chicot county, Arkansas, is hereby authorized and required to issue a writ of injunction according to the prayer of the within bill.

I hereby approve Nathan Hooker, as sufficient security upon the injunction bond, to be filed with the clerk aforesaid, before said writ shall be issued by said clerk.

Given under my hand and seal this 24th day of March, 1858.

THEODORIC F. SORRELLS,
Judge of the 2d Judicial Circuit of the State of Arkansas.

Endorsed on back of bill: Filed March 29, A. D. 1858.
Attest: S. N. CAUGHEY, *Cl'k.*
By S. L. DORSEY, *D. C.*

Bond for Injunction.

Know all men by these presents, that we, James S. Montgomery and N. B. Hooker, are held and firmly bound unto the county of Chicot in the sum of one hundred and ten dollars, for which payment well and truly to be made we bind ourselves, our heirs and assigns, firmly by these presents, and sealed with our seals this 27th day of March, A. D. 1858. The condition of the above obligation is such, that whereas the said James Montgomery has prayed and obtained an injunction restraining said *Mathews* from selling the lands mentioned in his said bill, now, therefore, if, upon the final hearing in said cause the said injunction be made perpetual, then this obligation to be void, otherwise to remain in full force and effect.

J. SMYLIE MONTGOMERY, [SEAL.]
N. B. HOOKER. [SEAL.]

Endorsed on back: Filed March 29th, 1858.

S. N. CAUGHEY, *Cl'k.*

1st Order. Extract Chancery Minutes, March Term, March 29th, 1858, 1st day.

JAMES S. MONTGOMERY, Complainant,
vs.
MARTIN R. P. MATHIS, as Sheriff, Def't.

2d Order. Extract Chancery Minutes, March Term, April 1st, 1858, 4th day.

JAMES S. MONTGOMERY, Comp't
vs.
M. R. P. MATHIS, as Sheriff, &c., Deft.

Now, on this day came said parties, by their solicitors, and this cause is ordered by the court here to stand continued until the next regular term of this court, with leave to said defendant to plead, answer, or demur to complainants' bill of complaint filed herein at said next regular term of this court.

Agreement of Counsel.

3d and Final Order. Extract Chancery Minutes, October Term, 7th day of October, 1858, 4th day of the term.

JAMES S. MONTGOMERY, Comp't,
vs.
MARTIN R. P. MATHIS, as Sheriff of Chicot county, Def't.

This day came the complainant and defendant, by solicitors, and by agreement and consent the answer of the defendant in the cause of Edmund McGee, No. 26, and exhibits thereto, are to be taken as an answer in this cause, and replication thereto in short, on the record by consent; and by consent this cause came on for final hearing on bill, said answer, exhibits, and the agreement of facts filed in said cause No. 26; and exhibits *was* read in this , and made applicable hereto, and was argued by counsel.

Decree.

And whereupon it is ordered, adjudged, and decreed by the court that the injunction granted in this cause be dissolved, and the bill be dismissed for want of equity, and that defendant recover from the complainant all his costs in this behalf expended.

From which decree the said complainant prayed an appeal to the Supreme Court, and the affidavit required by law being waived, such appeal is granted, and the same by consent is to operate as a supersedeas without security.

STATE OF ARKANSAS,
County of Chicot, ss.

I, Benjamin F. Stephenson, clerk of the circuit court in and for the said county of Chicot, and State of Arkansas, do hereby certify that

the foregoing 13 pages, and this page, do contain a true and complete transcript of the records and proceedings in the suit of James S. Montgomery, complainant, vs. Martin R. P. Mathis, as sheriff, &c., defendant on the chancery side thereof, as the same appears from the records and files of my office.

In testimony whereof I have hereunto set my hand as such clerk, and affixed the seal of said court, at office, in Lake Village, this the 22d day of December, A. D. 1858.

[SEAL.]

B. F. STEPHENSON, *Clerk.*

And afterwards, to wit, at a supreme court of said State, begun and held on the first Monday in January, A. D. 1859, were the following proceedings, on the 6th day of January :

Agreement of Counsel.

At this day come said appellant and appellee, by their solicitors, and their agreement of record filed in the case of James H. Wilson vs. Martin R. P. Mathis is also filed in this case.

And thereupon, on motion of said appellant, it is ordered that his assignment of errors be filed, and the same is filed.

Which said agreement is as follows:

Whereas Edmund McGehee, James H. Wilson, John J. Jackson & Co., Charles McDermott, Charles C. McDermott, James S. Montgomery, and William E. Bowling, filed their several bills of complaint against Martin R. P. Mathis, sheriff of Chicot county, restraining the collection of levee taxes on certain lands by them owned in said county, and said Mathis appeared and answered the bill filed by said McGehee, and an agreement of counsel was drawn up and signed and filed in said cause stating the facts relative to the matters and things arising in said suit, and by agreement of counsel, entered of record in the Chicot circuit court, said answer of Mathis and the agreement as to the facts, filed in the case of McGehee vs. Mathis, were to be taken and stand as the answer of Mathis and the facts in the other cases; and said causes were heard on such answers and agreement of facts, and the bills severally dismissed and injunctions dissolved; and said complainants appealed to this court, and said causes are now on the docket of this court, numbered from 263, 264, 278, 279, 280, 281, and 284, inclusive; but the transcripts in the said causes, except in the one of McGehee vs. Mathis, No. 264, do not contain the answer of said Mathis and said agreement of facts: Now we, as counsel for said parties, do hereby agree and consent that said answer and agreed state of facts in No. 264 may be taken and considered by the court as portions of the transcripts in the other of said causes, viz: 263,

278, 279, 280, 281, and 284, and hereby waive the necessity of having the same formally incorporated in said transcripts.

GARLAND & RANDOLPH,
For WILSON, MCGEHEE, and JOHN J. JACKSON & Co.
And WM. M. HARRISON and GARLAND & RANDOLPH,
For MCDERMOTT, BOWLING, and MONTGOMERY.
S. H. HEMPSTEAD,
Solicitor for Martin R. P. Mathis.

And said assignment of errors is as follows:

Ass't of Errors.

Comes the said appellant, by attorney, and says that there is error in the record and proceedings had in this cause in this—that is to say:

1st. The court erred in refusing to make the injunction perpetual, and in dissolving the same.

2d. In dismissing the appellant's bill, and refusing to grant the relief therein prayed; and

3d. The decree is in favor of the appellee when it should be in favor of the appellant, and this the said appellant is ready to verify; wherefore he prays judgment, &c.

HARRISON & HOOKER.

And afterwards, to wit, on the 12th day of November, A. D. 1859, at a term of said court begun on the first Monday of October, 1859, to which term this cause was continued by operation of law, were the following proceedings:

Joinder.

At this day comes said appellee, by his solicitor, and on motion it is ordered that his joinder in errors be filed; and thereupon the same is filed.

And at the same time comes said appellant, by his solicitor, and this cause is submitted in briefs, and by the court taken under advisement.

Which said joinder in errors is as follows:

And the said appellee, by his solicitor, comes into this honorable court and says that there is no error either in the record and proceedings aforesaid, or in rendering the decree aforesaid; and he prays that the court here may proceed to examine as well the record and proceedings aforesaid as the matters above assigned for error; and that the decree aforesaid, in form aforesaid given, may in all things be affirmed, with damages and costs.

Final Decree.

And afterwards, to wit, on the 4th day of February, at the said January term, A. D. 1860, of said supreme court, were the following proceedings:

This cause came on to be heard upon the transcript of the record of the circuit court of Chicot county in chancery, and was argued in this court by the solicitors of the parties, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said circuit court in chancery in this cause:

It is therefore ordered and decreed that the decree of said circuit court in chancery in this cause be, and the same is hereby, in all things affirmed, with costs.

It is further ordered and decreed that said appellee recover of said appellant all his costs in this court in this cause expended, and have execution thereof.

Bond in Error.

And afterwards, to wit, on the 10th day of February, A. D. 1860, came said appellant, by his solicitor, and presented a writ of error issued from the circuit court of the United States for the eastern district of Arkansas, duly allowed by the chief justice of this State, and filed therewith an appeal bond, in the following words:

Know all men by these presents that we, Augustus H. Garland as principal, and Gordon N. Peay as security, are held and firmly bound unto the said Martin R. P. Mathis in the sum of one hundred dollars, to be paid to the said Mathis, and for the payment whereof well and truly to be made, we bind ourselves, and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals, and dated this 7th day of February, A. D. 1860. Conditioned that whereas the above named Montgomery has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of Arkansas, in the suit there pending on appeal in chancery from the decree of the circuit court of the county of Chicot, in that State, in which suit the said Montgomery is appellant: Now, therefore, the condition of this obligation is such, that if the above named Montgomery shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall become void; else to remain in full force and virtue.

A. H. GARLAND. [SEAL.]
GORDON N. PEAY. [SEAL.]

STATE OF ARKANSAS.

Having fixed the amount of the foregoing bond at the sum of one hundred dollars, and the sureties therein being personally well known to me, and being by me considered as sufficient, the said writ of error being lodged in the office of the clerk of the supreme

court of the State of Arkansas, on this 10th day of February, A. D. 1860.

E. H. ENGLISH,
Ch. J. Sup. Court.

In testimony that the foregoing 19 pages contain a full, true, and complete transcript of the record and proceedings of said supreme court in the case of James S. Montgomery vs. Martin R. P. Mathis, except the briefs and opinion of the court.

I, Luke E. Barber, clerk of said supreme court, hereto set my hand and affix the seal of said court at my office, [SEAL.] in the city of Little Rock, on this 28th day of February, A. D. 1860.

L. E. BARBER, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Judges of the Supreme Court of the State of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of a decree in a certain suit upon an appeal in chancery from the decree of the circuit court of the county of Chicot, in the State of Arkansas, which is in said supreme court of the State of Arkansas, before you, between James S. Montgomery, appellant, and Martin R. P. Mathis, as sheriff and appellee, a manifest error hath happened, to the great damage of the said James S. Montgomery, as by his complaint it appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in said Supreme Court to be then and there held, that the decree and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 7th day of February, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fourth year.

[L. S.] Attest: A. H. RUTHERFORD,
Clerk of the Circuit Court of the United States for the Eastern District of Arkansas.

The within writ of error is allowed.

E. H. ENGLISH,
Ch. J. Sup. Ct. Ark.

Feb. 10th, 1860.

STATE OF ARKANSAS,
In the Supreme Court.

I, Luke E. Barber, clerk of the supreme court of the State of Arkansas, hereby certify, that in obedience to the mandate of the within writ, and the allowance thereof, I have made out a full, true and complete transcript of the record of proceedings in the case therein stated, except as in the certificate thereof is excepted, which said transcript is hereto attached.

In testimony whereof, I hereto set my hand as clerk of said supreme court, and affix the seal of said court at [SEAL.] my office, in the city of Little Rock, this 28th day of February, A. D. 1860.

L. E. BARBER, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

To Martin R. P. Mathis, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Arkansas, wherein James S. Montgomery is plaintiff, and you, as sheriff and ex-officio assessor and collector of Chicot county, Arkansas, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. H. English, chief justice of the supreme court of Arkansas, this 10th February, 1860.

E. H. ENGLISH,
Chief Justice Supreme Court of Ark.

I acknowledge service of the foregoing citation, this 10th of February, 1860, at Little Rock, Ark's.

S. H. HEMPSTEAD,
Sol. for Mathis.

Filed 30th June, 1860.

1657